

RED HILL VALLEY PARKWAY INQUIRY

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONOURABLE HERMAN J. WILTON SIEGEL
held via Arbitration Place Virtual
on Monday, April 25, 2022 at 9:35 a.m.

REVISED TRANSCRIPT

VOLUME 1

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1 Arbitration Place Virtual

2 --- Upon commencing on Monday, April 25, 2022

3 at 9:35 a.m.

4 MR. CENTA: Good morning,
5 Commissioner. My name is Rob Centa. I am lead
6 commission counsel on the Red Hill Valley Parkway
7 Inquiry which is called by the City of Hamilton.

8 I would like to open our
9 public hearings today by acknowledging the City of
10 Hamilton that called this inquiry is situated upon
11 the traditional territories of the Erie, Neutral,
12 Huron-Wendat, Haudenosaunee and Mississaugas.
13 This land is covered by the Dish With One Spoon
14 Wampum Belt Covenant which was an agreement
15 between the Haudenosaunee and Anishinaabek to
16 share and care for the resources and the Great
17 Lakes. We further acknowledge that the land on
18 which Hamilton sits is covered by the Between The
19 Lakes purchase 1792 between Crown and the
20 Mississaugas of the Credit First Nation.

21 Many of the counsel appearing
22 at this hearing today are located in Toronto,
23 which is on the traditional land of the
24 Huron-Wendat, the Seneca, and most recently the
25 Mississaugas of the Credit River. Today this

1 meeting place is still home to many indigenous
2 people from across Turtle Island and I'm grateful
3 to have the opportunity to work on this land.

4 First today I would like to
5 introduce the members of the commission counsel
6 team that will be presenting the evidence and
7 working on this hearing. With me today, and off
8 camera, are Andrew Lewis, Emily Lawrence, Hailey
9 Bruckner, Shawna Leclair, Chloe Hendrie, Lauren
10 Rainsford, and Jacqueline Cummins, our law clerk.

11 I would also like to welcome
12 counsel for the participants in the inquiry and
13 will ask a representative of each participant to
14 introduce the members of their team that are
15 present today. First for the City of Hamilton I
16 see Eli Lederman present.

17 MR. LEDERMAN: Good morning,
18 Mr. Commissioner. I'm getting some feedback here.
19 I don't know if you can -- is my audio okay?

20 JUSTICE WILTON-SIEGEL: Okay.

21 MR. LEDERMAN: Okay. Thank
22 you. So I'm assisted here today by a number of
23 colleagues who are with me, Delna Contractor,
24 Jonathan Chen, Jenene Roberts, Vivian Hua, Laura
25 McIntyre, and Christina Shiels-Singh.

1 MR. CENTA: Thank you,
2 Mr. Lederman. Another participant at the hearing
3 is the Province of Ontario who is represented by,
4 among others, Ms. Heather McIvor, and I invite
5 Ms. McIvor to introduce her team.

6 MS. MCIVOR: Thank you. Good
7 morning, Commissioner. I am here today to
8 represent the Province and the Ministry of
9 Transportation, and along with me is Colin
10 Bourrier as well as Michael Sage. Thank you.

11 MR. CENTA: Third participant
12 represented today is Golder Associates,
13 represented by Jennifer Roberts and I think there
14 are some other colleagues of Ms. Roberts present
15 today.

16 MS. ROBERTS: Good morning,
17 Commissioner. Good morning, Counsel. Yes, I'm
18 here today representing Golder, and I am assisted
19 by two colleagues, Nivi Ramaswamy and Fabiola
20 Bassong. Thank you.

21 MR. CENTA: And finally
22 Dufferin Construction, and I see Ms. Laurion --
23 and there is Ms. McAleer representing Dufferin. I
24 invite Ms. McAleer to introduce her colleagues.

25 MS. MCALEER: Good morning,

1 Mr. Commissioner. Good morning, Counsel.
2 Jennifer McAleer on behalf of Dufferin and I'm
3 with Rachel Laurion as well.

4 MR. CENTA: Because of the
5 ongoing COVID-19 pandemic we will be conducting
6 the public hearings via Zoom. The technological
7 backbone for today's hearing is being provided by
8 Arbitration Place. I wish to assure members of
9 the public that all of the counsel for
10 participants can see and hear the commissioner and
11 all other counsel, all of whom are appearing
12 remotely from each other.

13 We would ask that after we get
14 through the introductions the counsel who are not
15 speaking to turn off their cameras to reduce the
16 visual distraction on the screen. So people who
17 are watching via the live-stream may not be able
18 to see all of the counsel who are present at one
19 time. I expect that the Zoom process will go
20 smoothly, but if any counsel has any problems or
21 wishes to speak at a particular time just turn on
22 your camera, and we've also provided you with
23 contact information for our friends at Arbitration
24 Place who will assist us if something goes wrong.

25 Each day of the public

1 2013 friction report related to the Red Hill
2 Valley Parkway, and on April 24th, 2019, city
3 council passed a resolution pursuant to
4 section 274 of the Municipal Act 2001 requesting
5 Chief Justice of Ontario to appoint a superior
6 court judge to investigate matters related to the
7 disclosure of the friction report.

8 That resolution of city
9 council contained the terms of reference that will
10 guide the inquiry's work. The terms of reference
11 require the inquiry to determine facts relating to
12 24 questions posed by city council which fall into
13 five general categories.

14 First. Issues around the
15 friction testing conducted in late 2013 on the Red
16 Hill Valley Parkway and the Lincoln Alexander
17 Parkway, and the subsequent report based on it,
18 including who was involved in or received the
19 report, why it was not provided to city council or
20 the public, the circumstances surrounding it
21 coming to light in 2018, the steps taken at the
22 time, and the ramifications, if any, from the
23 report not having been disclosed.

24 Second. Issues around the
25 Ministry of Transportation of Ontario friction

1 testing on the Red Hill Valley Parkway that was
2 conducted in 2007 including whether the testing
3 supported or rebutted the 2013 friction test
4 results, who received those results, why the
5 results were not provided to city council or made
6 available to the public, and the ramifications, if
7 any.

8 Third. Whether the City or
9 the Ministry of Transportation conducted any other
10 friction tests, asphalt assessments or general
11 road safety reviews or assessments of the Red Hill
12 Valley Parkway and whether those test results
13 supported or rebutted the previous friction test
14 results.

15 Fourth. What are the
16 standards in Ontario, if any, respecting
17 acceptable friction levels and how do the test
18 results on the Red Hill Valley Parkway compare
19 with those standards.

20 Fifth. To what extent do
21 factors other than friction, including driver
22 behaviour, lighting, and weather conditions
23 contribute to motor vehicle accidents on the Red
24 Hill Valley Parkway as compared to the impact of
25 friction levels.

1 The second part of the
2 inquiry's mandate is to make recommendations
3 regarding the matters I just mentioned that appear
4 to be in the public interest, the interests of
5 good government of the City of Hamilton, and the
6 road safety on the Red Hill Valley Parkway.

7 I would like to quickly review
8 the principal activities of the inquiry since it
9 was established and how that work will support
10 these public hearings.

11 On October 30th, 2019 the
12 inquiry invited applications to participate and
13 seek funding at the inquiry and published rules
14 regarding such applications. We received nine
15 applications to participate. On February 12th,
16 2020 the Commissioner released his decision and
17 reasons concerning participation in funding at the
18 inquiry and he granted four entities the right to
19 participate in the inquiry, those participants
20 that I introduced previously: The City of
21 Hamilton, Her Majesty the Queen in Right of
22 Ontario, Dufferin Construction Company, a division
23 of CRH Canada Construction Group Inc., and Golder
24 Associates Limited.

25 On June 25th the inquiry

1 published rules of procedure which are available
2 on the website of the inquiry at www.rhvpi.ca.
3 And these rules cover topics including the
4 investigation phase of the inquiry, participants'
5 obligations to preserve and produce documents to
6 the inquiry, procedures for determining claims of
7 legal privilege, the creation of an inquiry
8 document database, the creation by commission
9 counsel of documents that identify the core or
10 background facts for use at the hearing, the
11 process for interviewing persons that may have
12 information that is relevant to the inquiry's
13 work, the disclosure of proposed evidence prior to
14 the public hearings, and rules for the conduct of
15 these public hearings.

16 In the commissioner's decision
17 on standing and funding, the commissioner outlined
18 several ways that other persons who did not have
19 participation status could nevertheless provide
20 information to the inquiry. These methods include
21 contacting commission counsel with information and
22 providing written submissions at the conclusion of
23 the public hearings. In addition, the
24 commissioner set out that he intended to provide a
25 forum in which individuals who had been personally

1 affected by particular accidents on the parkway
2 could be consulted as part of the inquiry even if
3 reconstruction of any particular accident is
4 unlikely to fall within the terms of reference.

5 This forum was intended to
6 provide any person who was directly or indirectly
7 affected by accidents on the parkway with the
8 opportunity to provide documents and to schedule
9 individual and private discussions with the
10 inquiry's team to provide us with a fuller
11 appreciation of the impact of particular accidents
12 on the residents of Hamilton.

13 The inquiry invited interested
14 persons to advise us of their interest in
15 contributing to the work of the inquiry through
16 this forum, and one member of the public accepted
17 our invitation. We had a very useful series of
18 meetings with Belinda Marazzato and we thank her
19 for her participation and invaluable contribution.
20 If anyone else still wishes to participate in
21 similar discussions they should contact me through
22 the contact information that will be available on
23 the inquiry website.

24 I want to speak briefly about
25 the document collection process because that took

1 up a significant amount of the time and energy of
2 the commission counsel and has led to some of the
3 work that I'm going to describe subsequently.

4 Paragraph 2 of the resolution
5 of Hamilton City Council directed the commissioner
6 to "...obtain, bearing in mind cost and the
7 principles of proportionality, all documents
8 necessary to answer the 24 questions posed in the
9 terms of reference."

10 Since the inquiry was called
11 commission counsel have been working with the
12 participants to identify and collect relevant
13 documents. We have also been working with
14 entities that, while not participants, are
15 anticipated to have relevant documents for our
16 work.

17 The inquiry issued summonses
18 requiring the recipients to deliver up to the
19 inquiry all documents covered by the summons.
20 This process has been time consuming for, among
21 other reasons, the COVID-19 pandemic and because
22 of the number of years covered by the terms of
23 reference.

24 To date commission counsel
25 have collected over 135,000 documents. These

1 documents have been loaded into a database to
2 permit us to share the productions with the
3 participants. We've reviewed all the documents
4 that we've received and have communicated with the
5 participants and others where we've identified
6 gaps and omissions to see if additional documents
7 can be located.

8 There are still a number of
9 documents that we believe are critical to the work
10 of the inquiry but over which the City of Hamilton
11 has asserted a legal privilege. Later this
12 morning the City will be bring a motion for
13 directions to assist with the determination of
14 whether or not the City is required to release
15 those documents for use at the inquiry. We will
16 return to that motion for directions later.

17 Now I would like to discuss
18 the overview documents which will be the first
19 exhibits that I'll be asking you, Commissioner, to
20 enter as exhibits at the hearing.

21 As I mentioned earlier, the
22 commissioner published rules of procedure for the
23 RHVPI's investigation and public hearings.
24 Rule 10 stated that the goal of the inquiry's
25 investigation, in part, was to identify the core

1 The commissioner will make the
2 findings of fact in his final report after he has
3 heard all of the evidence and received all of the
4 submissions, and in doing so the commissioner is
5 entitled to accept or reject some or all of the
6 documentary and oral evidence at the inquiry.

7 I would now like to introduce
8 the overview documents into evidence and have them
9 marked as the first exhibits, and I understand
10 that this is on with the consent of the
11 participants.

12 Registrar, if I could ask you
13 to please call up Overview Document number 1.
14 Overview Document number 1 is titled
15 "Introduction" and I ask that that be marked as
16 the first exhibit.

17 EXHIBIT NO. 1: Overview
18 Document 1: Introduction.

19 MR. CENTA: Registrar, could
20 you please call up Overview Document number 2.
21 Overview Document 2: City of Hamilton Governance
22 and Structure, and I ask that that be marked as
23 the next exhibit.

24 EXHIBIT NO. 2: Overview
25 Document 2: City of

1 Hamilton Governance and
2 Structure.

3 MR. CENTA: Registrar, could
4 you please call up Overview Document #3, Overview
5 Document number 3: Construction of the RHVP. If
6 I could ask that this be marked as Exhibit 3.

7 EXHIBIT NO. 3: Overview
8 Document 3: Construction
9 of the RHVP

10 MR. CENTA: Registrar, could
11 you please call up Overview Document number 3.1.
12 Overview Document 3.1: RHVP Design and Geometry,
13 and I ask that we mark this as Exhibit 3.1 largely
14 so we don't mess up the otherwise beautiful
15 correlation between overview document number and
16 exhibit number so early in the proceeding.

17 EXHIBIT NO. 3.1 Overview
18 Document 3.1: RHVP Design
19 and Geometry.

20 MR. CENTA: Registrar, could
21 you please call up Overview Document number 4.
22 Overview Document 4, the Ministry of
23 Transportation of Ontario and Friction Testing.
24 If I could ask that that be marked as Exhibit 4.

25 EXHIBIT NO. 4: Overview

1 Document 4, the Ministry
2 of Transportation of
3 Ontario and Friction
4 Testing.

5 MR. CENTA: Registrar, please
6 call up Overview Document number 5. Overview
7 Document 5: The RHVP 2008 to 2012 and City Road
8 Safety Initiatives 2008 to 2018. And if I could
9 ask that that be marked as Exhibit 5.

10 EXHIBIT NO. 5: Overview
11 Document 5: The RHVP 2008
12 to 2012 and City Road
13 Safety Initiatives 2008
14 to 2018.

15 MR. CENTA: Registrar, please
16 call up Overview Document number 6. Overview
17 Document 6: The 2013 CIMA Report and the 2013
18 Golder and Tradewind Reports. And if I could ask
19 that that be marked as Exhibit 6.

20 EXHIBIT NO. 6: Overview
21 Document 6: The 2013 CIMA
22 Report and the 2013 Golder and
23 Tradewind Reports.

24 MR. CENTA: Registrar, please
25 call up Overview Document number 7. Overview

1 Document 7: The 2015 CIMA Report. If I could ask
2 that that be marked as Exhibit 7.

3 EXHIBIT NO. 7: Overview
4 Document 7: The 2015 CIMA
5 Report.

6 MR. CENTA: Registrar, please
7 call up Overview Document number 8. Overview
8 Document 8: 2017 Pavement Evaluation and
9 RHVP-Related Safety Initiatives, November 2017 to
10 April 2018. If I could have that marked as
11 Exhibit 8, please.

12 EXHIBIT NO. 8: Overview
13 Document 8: 2017 Pavement
14 Evaluation and RHVP-Related
15 Safety Initiatives, November
16 2017 to April 2018

17 MR. CENTA: Registrar, please
18 call up Overview Document number 9. Overview
19 Document 9: Events Leading to the Discovery and
20 Disclosure of the Tradewind Report, if I could
21 please have that marked as Exhibit 9.

22 EXHIBIT NO. 9: Overview
23 Document 9: Events Leading
24 to the Discovery and Disclosure
25 of the Tradewind Report.

1 MR. CENTA: And finally
2 Overview Document number 10, Registrar, if you
3 could please call that up for me. Thank you.
4 Overview Document 10: Disclosure of Tradewind
5 Report to Council and Public. If I could that
6 that be marked as Exhibit 10.

7 EXHIBIT NO. 10: Overview
8 Document 10: Disclosure of
9 Tradewind Report to Council
10 and Public.

11 MR. CENTA: The overview
12 documents and the documents referred to in the
13 overview documents will now be made available on
14 the RHVPI website. The overview documents are
15 hyperlinked to the documents referenced in the
16 footnotes so that members of the public can see
17 the evidence that underlies those exhibits.

18 In addition to distilling the
19 evidence contained in the 135,000 documents into
20 the overview documents, Commission counsel have
21 also interviewed over 100 people who we believe
22 had information that they could share with the
23 inquiry. The people came from many walks of life,
24 current and former city employees, consultants
25 retained by the City, staff at the Ministry of

1 sit a little bit later where we think we would be
2 able to complete an examination, for example.
3 Today we will have a short day because of witness
4 availability.

5 I wish to remind viewers and
6 members of the public that a public inquiry is not
7 a trial. Although the witnesses will be under
8 oath, it is still not a trial. The commissioner
9 is not asked to and is not permitted to make
10 findings of civil liability or criminal
11 misconduct. This is an exercise in establishing
12 relevant facts.

13 Commission counsel will ask
14 the bulk of the questions to witnesses as it is
15 our role to present the evidence in a fair and
16 comprehensive manner. Counsel for the
17 participants will be allowed to question witnesses
18 for a period of time to be determined by the
19 commissioner.

20 The first witnesses to be
21 called will provide some background information on
22 some of the scientific issues that will inform the
23 work of the inquiry. After that we will be
24 calling evidence related to the design and the
25 construction of the Red Hill Valley Parkway. We

1 will describe what is going to happen for the next
2 two days, and then after that we will deal with
3 the City of Hamilton's motion for directions.

4 So unless you have any
5 questions for me, Commissioner, I will turn it
6 over to Mr. Lewis. Thank you.

7 MR. LEWIS: Thank you,
8 Mr. Centa.

9 Commissioner, as you know, the
10 first two witnesses will be Dr. Gerardo Flintsch
11 and Mr. Russell Brownlee. Both have provided
12 expert reports. Dr. Flintsch will present
13 tomorrow and Mr. Brownlee will do so on Wednesday.

14 Dr. Flintsch's report is
15 titled "Primer on Friction, Friction Management
16 and Stone Matrix Asphalt Mixtures." Dr. Flintsch
17 is a professor of engineering at Virginia Tech in
18 Virginia, United States of America, and is the
19 director of the Center For Sustainable and
20 Resilient Infrastructure at the Virginia Tech
21 Transportation Institute.

22 Mr. Brownlee's report is
23 titled "Principal Design and Maintenance
24 Standards, Guidelines and General Practices For
25 Ontario Highways." Mr. Brownlee is the CEO and a

1 principal of True North Safety Group in Toronto.

2 The purpose of their expert
3 reports and their evidence this week is not to
4 opine or comment on specific facts pertaining to
5 the Red Hill Valley Parkway; rather, the purpose
6 is to provide a base of knowledge to assist you,
7 the participants, and the public in understanding
8 and interpreting concepts, technical terms and
9 evidence that may be presented subsequently.

10 Dr. Flintsch's report in part
11 outlines the use of friction investigatory or
12 intervention levels as part of friction management
13 programs, primarily focusing on jurisdictions
14 outside of Ontario and Canada. And by
15 investigatory levels I mean stipulated measured
16 friction numbers or values at or below which a
17 highway agency is required to investigate whether
18 friction on a roadway is too low.

19 By intervention levels I mean
20 stipulated friction numbers or values at or below
21 which actual remedial action is required. And as
22 Mr. Centa mentioned, with respect to Ontario many
23 individuals currently or formerly employed at the
24 Ontario Ministry of Transportation will be called
25 as witnesses.

1 In addition to testifying with
2 respect to the Ministry of Transportation's
3 involvement in conducting friction testing on the
4 Red Hill Valley Parkway, a number of these
5 witnesses will testify as to MTO practice and
6 policy respecting highway friction management in
7 Ontario, including, but not limited, to its use of
8 approved aggregate sources for use in surface
9 course asphalt pavements, the standards applied in
10 evaluating the characteristics of those
11 aggregates, and its maintenance of a publicly
12 available approved aggregate source list.

13 We anticipate that individuals
14 from the Ministry of Transportation will also
15 explain the MTO's approach to friction measurement
16 and its use of the ASTM locked-wheel skid tester
17 for that purpose.

18 In addition, the participants
19 to the inquiry and commission counsel are
20 supplementing Dr. Flintsch's report in evidence
21 and the evidence of the MTO witnesses with a short
22 document titled "Agreed Summary of Pavement
23 Friction Practices in Canada." And could the
24 registrar please call up that document RHV-832,
25 "Agreed Summary of Friction Pavement Practices in

1 Canada."

2 This document has been agreed
3 to by the participants and commission counsel as
4 reflecting at a high level friction management
5 practices, and in particular, the lack of
6 published or publicly available standards setting
7 friction investigatory levels and intervention
8 levels in Canada. As well, this document provides
9 some additional, but by no means comprehensive,
10 information respecting Ontario's friction
11 management practices.

12 The short summary of this
13 summary document is that there are no published or
14 publicly available national or provincial
15 investigatory level or intervention level friction
16 standards in Canada, and that includes Ontario.
17 But, as I said, you will hear extensive evidence
18 about the MTO's approach to friction management
19 and measurement from their witnesses and there is
20 extensive evidence around those issues in overview
21 document 4 already introduced as an exhibit by
22 Mr. Centa.

23 Commissioner, I would ask to
24 make the "Agreed Summary of Pavement Friction
25 Practices in Canada," RHV932, an exhibit, and I

1 believe that would be Exhibit 12. Sorry, 11.

2 EXHIBIT NO. 11: Agreed Summary
3 of Pavement Friction Practices
4 in Canada, RHV932

5 MR. LEWIS: And with that I
6 would turn it back to Mr. Centa to I believe the
7 last matter for the day.

8 MR. CENTA: That leaves,
9 Commissioner, only one more thing to do today.

10 The City of Hamilton has
11 brought a motion for directions regarding a
12 privileged dispute. The relevant materials for
13 use on the motion for direction has been assembled
14 in a book of documents. Could I ask the registrar
15 please to call up the bundle of documents labelled
16 "City of Hamilton, Motion for Directions,
17 Privileged Dispute Process, April 25, 2022,
18 Materials for Use on Motion."

19 Thank you, Registrar. If I
20 could ask that this bundle of materials, which is
21 a Bates number that corresponds to the image
22 numbers within the PDF, if we could mark that as
23 Exhibit M1. And we will use that convention going
24 forward to separate out if there are any other
25 motions that the material filed on the motions

1 will be exhibited separately under the heading M1
2 and so on.

3 EXHIBIT NO. M1: Documents
4 labelled "City of Hamilton,
5 Motion for Directions,
6 Privileged Dispute Process,
7 April 25, 2022, Materials for
8 Use on Motion."

9 MR. CENTA: Registrar, please
10 go to image 2 of Exhibit M1. The materials that
11 we are putting before you today, Commissioner,
12 include the City of Hamilton's notice of motion
13 dated March 25th, 2022, a list of the withheld
14 disputed documents, a list of the redacted
15 disputed documents, a letter from commission
16 counsel to counsel for the City of Hamilton dated
17 November 22nd, 2021, that describes the process
18 that City and commission counsel engaged in, and
19 finally a letter from the Hamilton Spectator dated
20 April 7, 2022.

21 I can confirm that in my
22 discussions with counsel for the Spectator they
23 were content to have their letter placed before
24 you, Commissioner, but did not wish to make
25 further oral submissions on the motion for

1 directions, that they were content to rest on
2 their letter.

3 I understand today that
4 counsel for the City and counsel for Golder
5 Associates will speak to this motion, following
6 which I will make brief submissions to you, and I
7 invite Mr. Lederman on behalf of the City of
8 Hamilton to speak to the motion.

9 MR. LEDERMAN: Thank you,
10 Mr. Centa, and thank you, Commissioner.

11 This is a motion for
12 directions which the City of Hamilton is bringing
13 to appoint a designate pursuant to rule 15 of the
14 rules of procedure for the public hearing to
15 determine the claim for legal privilege with
16 respect to 43 unique documents over which the City
17 has maintained privilege and is the subject of a
18 dispute as to whether or not those 43 documents
19 are validly privileged.

20 Second, the motion for
21 directions is to direct that the designate -- that
22 the hearing before the designate be heard in
23 camera, and any motion materials filed with
24 redactions so as to protect information that may
25 be subject to legal privilege, including

1 privilege and therefore inadmissible at the
2 hearing stage of the inquiry pursuant to section
3 33(13) of the Public Inquiries Act.

4 In February of 2021 commission
5 counsel advised the City that it did not agree
6 with the City's assertion of privilege over these
7 documents, asserting that the City had waged
8 privilege over all documents relevant to the
9 inquiry.

10 The City subsequently produced
11 unredacted copies of these documents to commission
12 counsel on a without prejudice basis to permit
13 commission counsel to review and identify the
14 specific documents which commission counsel deemed
15 relevant to the work of the inquiry and the City
16 worked cooperatively with commission counsel to
17 find a balanced approach that would allow
18 commission counsel to have access to the
19 information that was truly relevant to the terms
20 of reference while also protecting the privileged
21 nature of the information.

22 Following those efforts the
23 City agreed to produce the majority of the
24 documents which commission counsel identified,
25 though, while maintaining the assertion of

1 privilege over 43 unique documents. It's a total
2 of 87 when you count duplicates and partial e-mail
3 chains, but in essence it's 43 unique documents.

4 Those are the documents that
5 are the subject of a dispute. Commission counsel
6 has indicated that it wishes to challenge the
7 City's privilege assertion over those documents,
8 and we have conferred with Mr. Centa and his team
9 and they support this motion for directions to
10 appoint a delegate to adjudicate this question of
11 privilege over these documents and to have the
12 hearing of that process held in camera.

13 I do want to address, if I
14 could, Commissioner, just the basis for seeking
15 the orders that we do here today, pursuant to
16 rule 15C of the rules, provides that the
17 commissioner may appoint a designate to exercise
18 the powers of the commissioner in respect of the
19 determination of claims of privilege, and indeed
20 that practice of appointing a designate to
21 adjudicate privilege claims has been followed by a
22 number of other public inquiries.

23 For example, in the Elliot
24 Lake inquiry, Justice Gage, who was a designate of
25 the commissioner the Honourable Paul Bélanger,

1 adjudicated the privilege claim as asserted by two
2 summons (ph) parties over a number of documents
3 that were relevant to the inquiry. Similarly, in
4 the Goudge inquiry, the associate chief justice of
5 Ontario was appointed as a designate of the
6 commissioner to adjudicate privilege claims
7 asserted by Kingston Police Service.

8 In my respectful submission,
9 Commissioner, appointing a designate to review
10 privilege claims is consistent with also Justice
11 Bellamy's recommendation in her report following
12 the TCI inquiry that issues of solicitor client
13 privilege be resolved by reference to, in that
14 case, the regional senior justice of the superior
15 court of justice or a judge designated by him.

16 Let me also, if I could,
17 Commissioner, highlight rule 37 of the rules which
18 empower the commissioner to direct that matters
19 within the inquiry proceed in the absence of the
20 public where such a direction is in the public
21 interest.

22 The City seeks direction to
23 have the privilege motion adjudicated in camera,
24 as that would ensure that the privileged
25 information contained in the 43 documents at issue

1 will remain confidential in the event that the
2 delegate determines that the documents indeed are
3 privileged. If a motion is not held in camera or
4 if the motion materials are made publicly
5 available without redactions, the parties would be
6 prevented from referencing the privileged
7 information in their submissions which would make
8 the adjudication process much more challenging for
9 the designate to adjudicate the question of
10 privilege if the parties and counsel cannot make
11 specific reference to the privileged information.

12 We understand that commission
13 counsel has agreed that the motion ought to be
14 heard in camera and that the materials ought to be
15 made publicly available but redacted to protect
16 the privileged information contained within these
17 documents. We've also seen the correspondence
18 from the Hamilton Spectator which has opposed a
19 total in camera hearing for the motion and
20 proposes that only those portions of the motion
21 where the impugned documents are actually being
22 discussed are to be held in camera.

23 While the City is certainly
24 not opposed to that concept in principle,
25 practically speaking we anticipate that much of

1 the parties' submissions on the privilege motion
2 will necessarily need to focus on the content of
3 that privileged information which could not be
4 done or conducted in open court or in a public
5 forum. Certainly the City would be pleased to
6 work with commission counsel on the lead-up to the
7 motion to assess whether there are any portions of
8 the privilege motion that could be heard publicly,
9 but practically speaking, there will be some
10 challenges with doing that, given the entire
11 nature of the motion involves the adjudication of
12 the question of legal privilege.

13 I know that Ms. Roberts is
14 going to speak on behalf of Golder, but I do want
15 to make reference to the fact that the City is
16 aware that Golder wishes to make written
17 submissions on the privilege motion with respect
18 to the City's claim for privilege and I just -- I
19 would like, Commissioner, for you to know that the
20 City is not opposed to Golder making such written
21 submissions, but it should not, in our respectful
22 view, receive access to the privileged documents
23 in question which are the subject of the
24 adjudication process which we propose to be heard
25 by the designate.

1 Subject to any questions,
2 Commissioner, those are my submissions with
3 respect to the motion for directions.

4 JUSTICE WILTON-SIEGEL: No
5 questions at this point, thank you.

6 MR. CENTA: Ms. Roberts, would
7 you wish to make submissions at this time?

8 MS. ROBERTS: Thank you. So
9 first of all, we take no position in relation to
10 the relief sought in the motion for directions.
11 And in response to the point made by Mr. Lederman
12 that Hamilton doesn't oppose making written
13 submissions but would oppose us seeking access to
14 the documents, I confirm that we are not seeking
15 access to the documents themselves but only seek
16 the opportunity make submissions in relation to
17 the privilege, and essentially for the purpose of
18 expressing a view as to why it is relevant to
19 Golder.

20 JUSTICE WILTON-SIEGEL: Okay.

21 MS. ROBERTS: As you know,
22 Golder's position is the evidence we anticipate
23 that will come out is that it delivered the
24 Tradewind advice to the City of Hamilton, enclosed
25 within the Golder report, and provided an

1 assessment of friction as well as recommendations
2 in early 2014 and then subsequently provided its
3 assessment and recommendations on a number of
4 subsequent moments in March of 2016 and then at
5 least on three occasions in 2018.

6 We anticipate,
7 Mr. Commissioner, that as part of this process
8 that you will seek to scrutinize the extent to
9 which Golder was effective in communicating its
10 findings and recommendations, and it is our
11 position that in order to do so fairly that it
12 will be important to see the full spectrum of the
13 evidence as to what happened with the report, what
14 happened with the advice internally within the
15 City of Hamilton and particularly within
16 (indiscernible), and for that reason we seek the
17 opportunity to have our voice heard at that
18 motion.

19 Thank you. Those are my
20 submissions, subject to your questions.

21 JUSTICE WILTON-SIEGEL: I have
22 no questions apart from asking Mr. Centa, do I
23 then take it that there is no objection to the
24 request of Golder as stated today simply to make
25 written submissions?

1 MR. CENTA: No, Commissioner.
2 Commission counsel supports both the City's motion
3 for direction and Golder's request to be able to
4 make written submissions to the delegate. In our
5 view it is appropriate to appoint a delegate to
6 determine this matter. In our view it would be
7 open to you to review the documents; however, we
8 agree with the City that in these circumstances it
9 is appropriate to appoint a delegate to review
10 this collection of documents.

11 Commission counsel is very
12 mindful of the concerns expressed by the Hamilton
13 Spectator and we agree that the dispute resolution
14 process should be as open as possible, but the
15 process in our submission cannot destroy the very
16 privilege that the City of Hamilton is asserting.
17 It would be -- would not be an appropriate outcome
18 for the process to determine whether or not they
19 have a valid claim of privilege or to destroy the
20 subject matter of the privilege.

21 So we encourage you in your
22 direction as set out in the request for relief
23 from the City to allow a process that is open as
24 possible but that adequately protects the
25 privilege asserted by the City of Hamilton. And

1 will be of most assistance to the delegate is a
2 careful document-by-document fact-by-fact
3 discussion of the privilege -- the existence of
4 the privilege and whether it is continued to this
5 date, and that is not a set of submissions that
6 could readily be made in public but we will work
7 together with the City to -- and the delegate to
8 see what would be helpful in determining this
9 matter.

10 And those are my submissions,
11 unless you have any questions for me.

12 JUSTICE WILTON-SIEGEL: I
13 don't, except to say I understand there may be
14 some agreement with respect to the arbitrator --
15 or the delegate.

16 MR. CENTA: If you make the
17 decision to appoint the delegate we believe that
18 we will be able to appoint a delegate to fulfill that
19 task very quickly.

20 JUSTICE WILTON-SIEGEL: I have
21 no further questions. This is a matter that I
22 will provide directions on after the close of this
23 session, before the opening of tomorrow's session.

24 MR. CENTA: Thank you. Unless
25 any of the counsel for the participants have

1 anything to add that would bring to conclusion
2 both the motion for directions and the matters
3 that we wished to put before you today,
4 Commissioner.

5 Unless anyone has anything to
6 add right now we will return at 9:30 tomorrow for
7 the first day of live evidence.

8 JUSTICE WILTON-SIEGEL: Okay.
9 Thank you. We'll stand adjourned until 9:30
10 tomorrow morning.

11 MR. CENTA: Thank you.

12 --- Whereupon at 10:28 a.m. the proceedings were
13 adjourned until Tuesday, April 26, 2022
14 at 9:30 a.m.

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